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In The
Supreme Court of the United States

DONALD A. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE INDIVIDUALLY, AND NICOLE M. PETRONE, A MINOR, BY AND THROUGH HER FATHER, RICHARD P. PETRONE,

Petitioners,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a tile painting project that was initiated, organized, and supervised by school officials pursuant to established guidelines, funded at the discretion of school officials, and resulted in a permanent display in the school constitutes school-sponsored speech within the meaning of *Hazelwood School District v. Kuhlmeier*.

II. Whether the Tenth Circuit properly applied the legitimate pedagogical concerns test of *Hazelwood School District v. Kuhlmeier*.

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STATEMENT OF THE CASE

Petitioners' statement of facts consists largely of excerpts of raw testimony, implicitly conceding that the findings of the lower courts are inadequate to sustain their position. The findings of the lower courts are sufficient to frame the issues.

On April 20, 1999, Eric Harris and Dylan Klebold attacked Columbine High School with homemade bombs and automatic weapons, killing twelve classmates and one faculty member before taking their own lives. *Fleming v. Jefferson County Sch. Dist. R-1*, 170 F. Supp. 2d 1094, 1098 (D. Colo. 2001). The severely damaged building was sealed as a crime scene, requiring the surviving students to complete the school year at a neighboring school. *Id.*

The prospect of reintroducing students to the Columbine building posed significant mental health challenges. *Id.* School officials made a concerted effort to change the building's appearance to avoid incorporating sensory cues that could reactivate memories of the attack. *Id.* at 1098-99. A number of activities were held to reacquaint students with the building. One of these activities involved inviting students, families of the victims, and members of the affected community, such as rescue workers, to paint decorative ceramic tiles that would be placed on the walls of the school's hallways.[1] *Id.* at 1099.

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[1] The process of decorating the halls with ceramic tiles began prior to the attack with students producing abstract, nonobjective tiles or tiles related to the subject matter of their classes such as frogs, volcanos, bugs, and lightning. *Fleming v. Jefferson County Sch. Dist. R-1*, 170 F. Supp. 2d 1094, 1098 (D. Colo. 2001). There are approximately

(Continued on following page)

In order to prevent the project from becoming a memorial to the tragedy, area administrator Barbara Monseu directed that the tiles could not contain references to the attack, the date of the attack, names or initials of students, the blue Columbine ribbon,[2] religious symbols, or anything offensive. *Id.* A school district press release explained that the project, "will serve two purposes. Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be part of the reconstruction of their school."[3] *Id.*

Materials for the tile project were purchased with donations that were to be used at the discretion of the high school administrators. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 921 (10th Cir. 2002). The session was supervised by three teachers. *Fleming*, 170 F. Supp. 2d at 1100. Participants entered through a door where a notebook and examples of abstract or nonobjective tiles were displayed as illustrations of acceptable tile designs.

2100 tiles on the walls of the school. *Id.* at 1103. The photos in Petitioners' Lodging encompass a small and unrepresentative sample of these 2100 tiles, focusing instead on tiles that were rejected, and even then contain an unrepresentative selection of the rejected tiles.

[2] The Columbine ribbon is a loop of blue ribbon that commemorates the attack similar to the loops of red, white, and blue ribbon that commemorate the terrorist attacks of September 11, 2001.

[3] Petitioners' representation that the purpose of the project was to allow persons "to express themselves regarding the process of healing from the trauma caused by the shooting" is an embellishment of their own construction. Healing was to be effected by reacquainting students with the building and taking part in its reconstruction. As Petitioners concede, the project's guidelines forbade references to the attack.

Id. The guidelines were verbally communicated to participants. *Id.* The teachers tried to screen out tiles that were inconsistent with the guidelines, but were unable to keep pace with the volume of tiles being produced. *Id.* Consequently, some tiles that were inconsistent with the guidelines were covered with an opaque glaze and sent to be fired in a kiln. *Id.* Petitioners, parents of students who were murdered in the attack, objected to the guidelines. *Id.* The teachers allowed Petitioners to paint tiles as they wished, but informed them that tiles that did not comply with the guidelines would be returned to them and would not be affixed to the school walls. *Id.* Petitioners produced tiles that included the phrase, "Jesus Christ is Lord," and "There is no peace says the Lord for the wicked." *Id.* at 1101. Two Petitioners hoped to paint tiles stating "4/20/99 Jesus Wept," but declined to do so when they learned that the tiles would not be displayed. *Id.*

One of the supervising teachers organized parent volunteers to glue the tiles to the walls. She instructed the volunteers to set aside tiles that were questionable or inappropriate. *Id.* at 1102. Due to the volume of tiles and limited time, she was unable to supervise the installation on a tile-by-tile basis. *Id.*

Shortly before the Columbine building was to be reopened, Ms. Monseu noticed that some tiles affixed to the walls did not comply with the guidelines. *Id.* at 1102-03. She directed assistant principal Patricia Patrick to remove any tiles that contained a memorial to the attack, a name, a religious symbol, or a date. *Id.* at 1103.

Ms. Patrick removed approximately eighty tiles including tiles with crosses, the Star of David, the Columbine ribbon, the date of the attack, tiles with names, and a

tile with the initials "DK" incorporated into the design, thought to represent the initials of Columbine assailant Dylan Klebold. *Id.* A tile depicting a face with blood dripping from the temple was removed. *Id.* Ms. Patrick removed tiles with the anarchy symbol and gang graffiti as well as tiles that Ms. Patrick believed may have incorporated symbols with a meaning discernible only to juveniles hoping to get away with something. *Id.* Ms. Patrick also removed a tile mural created by an art teacher because the teacher had signed her name to the mural. *Id.* She removed a tile mural created by a second art teacher because its red colors were perceived by some viewers as blood spatter.[4] *Id.*; Applt. App. at 776.

Ms. Monseu subsequently offered to allow the families of the murdered children to prepare a tile with the name of their child, but not the date of the shooting, religious symbols, or anything offensive. *Id.* at 1103-04. Petitioners refused and brought suit alleging violations of the Free Speech Clause, the Establishment Clause, the Free Exercise Clause, and the Colorado Constitution. *Id.* at 1096, 1104.

The district court entered judgment for Respondent on every claim except the free speech claim. *Id.* at 1122-23. Respondent appealed the free speech claim. Petitioners did not cross-appeal. The Tenth Circuit, in an opinion by Judge David Ebel, joined by Judges Murphy and Henry,

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[4] Thus, Petitioners' representation that "[s]chool officials strictly enforced only one rule relating to the viewpoint of the expression on the tiles – a prohibition on religious symbols of any kind" (Pet. at i) is contradicted by the record. (The notation Applt. App. refers to the record on file with the Tenth Circuit.)

reversed. *Fleming*, 298 F.3d at 934. Petitioners' motion for rehearing *en banc* was denied without dissent.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit Correctly Applied *Hazelwood*.

A. The Tenth Circuit's Decision Is Correct.

The Tenth Circuit's decision is anchored to *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* arose out of a conflict between student reporters and the school principal regarding articles to be published in the school newspaper. The Court framed the issue as follows:

> The question of whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school to affirmatively promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school sponsored publications, theatrical productions, and *other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school.*

Id. at 270-71 (emphasis added). The Court also observed that absent creation of a public forum, "school officials may impose reasonable restrictions on the speech of students, teachers, *and other members of the community*." *Id.* at 267 (emphasis added).

The Court held that educators may regulate school-sponsored speech as long as those regulations are reasonably related to legitimate pedagogical concerns. *Id.* at 273. These concerns go beyond enforcing the rules of grammar:

> A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order or to associate the school with any position other than neutrality on matters of political controversy.

Id. at 272.

The Tenth Circuit noted that *Hazelwood* occupies a middle ground between private speech that is broadly protected by the First Amendment and government-funded speech to which the First Amendment does not apply. *Fleming*, 298 F.3d at 923. The court determined that the tiles project constituted a school-sponsored expressive activity within the meaning of *Hazelwood* because:

> The tiles at issue in this case will become a lasting part of the school. The presence of permanently affixed tiles on the walls implicates the school's approval of those tiles. When coupled with organizing, supervising, approving the funding, and screening the tiles, the school's decision permanently to mount them on the walls conveys a level of approval of the message. If a tile advocating racial hatred or sexual bigotry or encouraging the use of illicit drugs were affixed to the walls, community members rightly might

> protest that the school implicitly if not explicitly promoted such values.

Id. at 930.

The court noted that two pedagogical concerns underlay the project's guidelines – "to ensure that the interior of the building remained a positive learning environment, and not become a memorial to the tragedy, and . . . to avoid divisiveness and disruption from unrestrained religious debate on the walls." *Id.* at 932. The court found both concerns to be legitimate. *Id.* at 931-32; *accord Hazelwood*, 484 F.3d at 272 (school officials may refuse to sponsor speech that "associate[s] the school with any position other than neutrality on matters of political controversy.").

The court also stated that *Hazelwood* does not require legitimate pedagogical concerns to be viewpoint neutral, explaining: "No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint." *Fleming*, 298 at 928; *accord Hazelwood*, 484 U.S. at 272 ("school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use"). It further explained: "If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as 'God is Hate,' once it allows tiles that say 'God is Love.'" *Fleming*, 298 F.3d at 934. The court held: "[W]e believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Id.*; *accord Hazelwood*, 484 U.S. at 272 ("A school must also retain the authority to refuse to . . . associate the school with any

position other than neutrality on matters of political controversy.").

In the end, the Tenth Circuit correctly applied *Hazelwood* to the tiles project.

B. The Tile Project Is School-Sponsored Speech That Bears the School's Imprimatur.

Petitioners contend that the Tenth Circuit's application of *Hazelwood* to the tiles project represents a "dramatic departure" from this Court's precedents. Petitioners, however, offer no argument to demonstrate why this is so. Instead, they simply argue that if the project had been considered a limited or nonpublic forum, the outcome would have been different. Neither their premise nor their conclusion is correct.

While *Hazelwood* arose in the context of a student newspaper, courts have routinely noted that its rationale is more broad. *E.g. Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991) ("Although the facts of *Hazelwood* dealt with student expression, its rationale is not so limited.") Thus, the *Hazelwood* analysis has been applied to the expressive activities of teachers, guest speakers, marching bands, advertisers in school newspapers, advertisers on the fence of a high school baseball diamond, and participants in a high school career day. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (baseball field), *cert. denied*, 529 U.S. 1067 (2000); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (guest speaker), *cert. denied*, 515 U.S. 1160 (1995); *Miles v. Denver Publ. Schs.*, 944 F.2d 773 (10th Cir. 1991) (teachers); *Planned Parenthood*, 941 F.2d 817 (advertisers);

Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) (career day); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (marching band).

Petitioners appear to assert that the tile project should have been considered a limited or nonpublic forum and analyzed under such cases as *Good News Club v. Milford School District*, 533 U.S. 98 (2001) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). The analogy, however, does not hold. For example, the religious club in *Good News* was not initiated by school personnel. School officials did not authorize funding for the club or supervise the meetings to insure that they complied with school guidelines. Finally, the club was not allowed to create a permanent display in the school hallways. *Good News*, *supra*. All of the cases cited by Petitioners involved the temporary use of school facilities for *private activities*. They did not involve *school activities*. There is a distinction of constitutional significance between private activities and school activities. *Compare Good News*, 533 U.S. at 115 (private religious activities that occur after school in school facilities do not implicate Establishment Clause) *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (religious activities at football game implicate Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (religious activities at graduation implicate Establishment Clause).

Here, the evidence is undisputed that the tile project was initiated, organized, and supervised by school personnel. *Fleming*, 298 F.3d at 930. School personnel set and enforced guidelines for the project. *Id.* School personnel authorized payment for the project. *Id.* Finally, approved tiles were put on permanent display in the school hallways. Given that the term "imprimatur" means "let it be

printed,"[5] the Tenth Circuit's conclusion that the tile project constituted a school-sponsored expressive activity bearing the imprimatur of the school was not a dramatic departure from precedent, but a straightforward application of *Hazelwood*.[6]

C. The Tenth Circuit's Decision May Be Affirmed on the Broader Grounds of Government Speech.

While the Tenth Circuit found *Hazelwood* to occupy a middle ground between private speech and government-funded speech, the tile project easily fits within government speech precedents.

School officials determined that the project should not be a memorial to the tragedy or a site for religious debate.[7]

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[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (1986).

[6] Petitioners attempt to forge a limited public forum out of an isolated statement from Ms. Monseu's deposition that the tile project was something "outside of school." As the Tenth Circuit properly recognized, however, the full remark is ambiguous at best and does not erase the pervasive involvement of school officials. *Fleming*, 298 F.3d at 930-31, n.11.

[7] Petitioners' representation that "the entire tile project served as a reminder of the shooting" is not sustained by the record. As noted above, the Lodging depicts only a handful of the tiles that are on the walls, focusing primarily on selected tiles that were rejected. While Petitioners attribute meaning to any tile that includes thirteen objects, be they stars, butterflies, or raindrops, there are tiles with, for example, seven raindrops (ex. 3 of Applt. App., photo #113), eight raindrops (#181), eighteen raindrops (#30), twenty-three raindrops (#171), forty raindrops (#147), and many, many raindrops (#145). Thus, Petitioners discern a meaning that perhaps was not intended and exists only if viewers actually count objects, an unlikely scenario for students moving between classes. To the extent that Petitioners identify tiles that may

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Petitioners, families who lost children in the attack, sought to produce and display tiles that memorialized the attack and included religious inscriptions, *e.g.*, "4/20/99 Jesus Wept," "There is no peace says the Lord for the wicked," and "God is Love." While their motivations are understandable, Petitioners are no different from artists complaining after a patron refuses to display work that is not consistent with the work that the patron commissioned. An artist may object to the terms of a government commission, but the First Amendment does not entitle the artist to change the commission. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833-34 (1995) ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."); *see also Rust v. Sullivan*, 500 U.S. 173 (1991) (government may support discussion of family planning services but prohibit mention of abortion).

This analysis has been applied where a teacher who otherwise had access to school bulletin boards insisted that he had a First Amendment right to post materials that conflicted with the school's efforts to promote tolerance of gay and lesbian students. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). The Ninth Circuit rejected his claim, stating that because the bulletin boards were a manifestation of the school policy to promote tolerance and the school principal had final authority over the content of

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or may not bear a reference to the attack, they demonstrate only that the school's screening of 2100 tiles was less than perfect, not that the school intended to do what the guidelines sought to avoid – create a memorial.

the bulletin boards, all speech that occurred on the bulletin boards was the school's and the teacher could not use the First Amendment to force the school to embrace his viewpoint. *Id.* at 1012, 1015.

Here, Petitioners were given special access to a captive audience of students and sought to use that access to create a memorial to the attack and to engage the students in a debate that the school sought to avoid. In the end, the Tenth Circuit's application of *Hazelwood* was not a dramatic departure from precedent, but a cautious application of the narrower of two precedents.

II. The "Conflict" Between Circuits Is One of Form Not Substance.

A. The "Conflicting" Cases Support the Tenth Circuit's Conclusion.

Petitioners contend that by interpreting *Hazelwood* to allow school officials to make viewpoint-based decisions that are reasonably related to legitimate pedagogical concerns, the Tenth Circuit placed itself in conflict with other circuits. The "conflicting" cases, however, do not contradict the result reached by the Tenth Circuit, but instead demonstrate that the decision may be affirmed without reaching the issue presented by Petitioners.

Petitioners argue that "[t]he Tenth Circuit's holding is in direct conflict with . . . the Ninth Circuit's decision in *Downs*,"[8] a contention that is well off the mark given that *Downs* applied the government speech analysis instead of

[8] Pet. at 18 (citation omitted).

Hazelwood. *Downs*, 228 F.3d at 1011. Instead, the case at the heart of the asserted conflict is *Planned Parenthood,* in which a school refused to run an advertisement submitted by a family planning organization in the school's newspaper. 941 F.2d at 819. *Planned Parenthood* does state that under *Hazelwood* restrictions on school-sponsored speech must be viewpoint neutral.[9] 941 F.2d at 829. Nonetheless, the court *upheld* the school's refusal to run the advertisement as a reasonable means for the school to "avoid being forced to open up their publications to advertisements on both sides of the 'pro-life' – 'pro-choice' debate." *Id.* This reasoning parallels the Tenth Circuit's holding: "[T]he District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 934. In short, just as the Ninth Circuit permitted a school to abstain from the pro-life/pro-choice debate, the

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[9] The Ninth Circuit's leap to viewpoint neutrality is somewhat truncated:

> Having concluded that the advertising pages in the school district's school-sponsored publications are nonpublic forums, we now consider whether the school's justification for refusing to publish Planned Parenthood's advertisement is reasonable. *Hazelwood*, 484 U.S. at 270. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.

Planned Parenthood, 941 F.2d at 829. If *Hazelwood* had transposed the limited or nonpublic forum analysis of *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), to the educational setting, the discussion of school-sponsored speech and legitimate pedagogical concerns – the express holding of the case – would have been unnecessary. 484 U.S. at 273.

Tenth Circuit permitted a school to abstain from the God is Love/God is Hate debate. In fact, the Tenth Circuit expressly relied on Ninth Circuit precedent to reach its holding:

> Two courts recently have recognized a school's legitimate interest in avoiding religious controversy and disruption resulting from the posting of religious speech. In *DiLoreto,* the Ninth Circuit found the school district's decision to exclude advertisements on a baseball field fence "on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy." 196 F.3d at 969. The *DiLoreto* court found that because students were a "captive audience" at classes and school-sponsored events, the district's desire to avoid "controversy and distraction created by political and religious messages" on the fence was reasonable. *Id.* at 968. The Court also noted the school district's concern that posting the religious speech, "would force [it] to open the forum to all expressions of personal beliefs." *Id.* The Seventh Circuit in *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. denied,* 122 S. Ct. 1606 (2002), recognized similar concerns, upholding a principal's decision prohibiting a religious group's posting of a cross because he feared that allowing the cross "might also require him to approve murals of a Satanic or neo-Nazi character which would cause an uproar." *Id.* at 466. *Like these courts, we believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls.*

Fleming, 298 F.3d at 933-34 (emphasis added).

Gernetzke arose after a school invited student clubs to paint murals in the school hallways, but the principal rejected design elements of murals offered by skinheads (a swastika), Students Against Drunk Drivers (a brand of beer), and the Bible club (a Latin Cross). 274 F.3d at 466. The Bible club sued. The Seventh Circuit, relying on *Hazelwood*, upheld the principal's decision. Judge Posner explained that the principal's "reaction to the swastika, and to the naming of the brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that lead to litigation or disorder." *Id.* at 466. Here, of course, the school removed tiles with the Columbine ribbon, the date of the attack, a tile of a face with blood dripping from the temple, tiles with the anarchy symbol and gang graffiti, and a tile with an art teacher's signature.

A "conflict" in which three circuits reach the same conclusion and cite each other in the process is not a conflict at all. The distinction, if there is one, is that the Ninth Circuit views a school's decision to prevent school walls from becoming the site of a religious debate as a permissible restriction on subject matter,[10] while the Tenth Circuit views the restriction as being reasonably related to the legitimate pedagogical concern of "preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 934. In short, the Tenth Circuit's legitimate pedagogical concern is treated as a restriction on subject matter by the Ninth Circuit. *See DiLoreto*, 196 F.3d at 969.

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[10] *DiLoreto*, 196 F.3d at 969.

Given that Columbine educators did not post "God is Hate" to the exclusion of "God is Love," the "conflicting" cases demonstrate that the school's decision may properly be considered a restriction on subject matter.

For example, the "conflicting" decision from the Eleventh Circuit states that "*Hazelwood* acknowledges a school's ability to discriminate based on *content* not *viewpoint*,"[11] but explains that this allows educators to exclude discussion of controversial matters such as "the morality of war or defense spending,"[12] reasoning that tracks the analysis of the Seventh Circuit,[13] the Ninth Circuit,[14] and the Tenth Circuit. *Fleming*, 298 F.3d at 934 (restriction on religious symbols was reasonably related to legitimate goal of preventing disruptive religious debate). Similarly, the "conflicting" Third Circuit case states that *Hazelwood* permits "reasonable non-viewpoint-based restrictions,"[15] but adds that since the challenged "provisions appear to exclude all religious speech and not just one particular viewpoint, such a limitation would constitute a permissible content-based restriction,"[16] reasoning that is consistent with the Seventh, Ninth, Tenth, and Eleventh Circuit cases discussed above.[17]

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[11] *Searcey*, 888 F.2d at 1319 n.7 (emphasis in original).

[12] *Id.* at 1323.

[13] *Gernetzke*, 274 F.3d at 466 (upholding prohibition on religious or secular displays that may lead to "litigation or disorder").

[14] *DiLoreto*, 196 F.3d at 969 (potential for disruption and controversy justified excluding Ten Commandments from outfield walls).

[15] *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992).

[16] *Id.* at 1122.

[17] Petitioners assert that the Tenth Circuit is in conflict with the Sixth Circuit. This "conflict," however, is dicta from a decision that was

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As the foregoing makes clear, the "conflict" is one of form not substance, and the differing analytical frameworks have not yielded conflicting results.[18] In fact, Petitioners fail to identify a single circuit in which the outcome of this case would have been different. In the end, the conflicting cases demonstrate that the school's guidelines may be upheld as permissible restrictions on subject matter without addressing whether *Hazelwood* authorizes school officials to make viewpoint-specific decisions that are reasonably related to legitimate pedagogical concerns.[19]

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reversed. *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999) (interpreting but not applying *Hazelwood*), *rev'd*, 236 F.3d 342 (6th Cir. 2001).

[18] Both times that the Ninth Circuit has applied *Hazelwood* – *Planned Parenthood* and *DiLoreto* – it has upheld the school's editorial choice. In the thirteen years since *Searcey* was decided, no court has relied upon it to overturn a school's editorial choice. Nor has any court relied upon *Brody* to overturn a school's editorial choice in the eleven years since it was decided. Thus, the "conflict" hardly represents a pressing issue in the area of education law. Moreover, the "conflict" may well resolve itself. A Ninth Circuit panel recently acknowledged that the leap to viewpoint neutrality may have been ill-considered. *Downs*, 228 F.3d at 1010 ("Despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' into nonpublic forum, school-sponsored speech cases in our Circuit."). Subsequently, another Ninth Circuit judge announced: "*Hazelwood* . . . establish[es] that – consistent with the First Amendment – a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose." *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002) (Graber, J.).

[19] Petitioners' argument that they would have prevailed if the tile project had been treated as a limited or nonpublic forum is undone by the fact that "control over access to a nonpublic forum can be based on

(Continued on following page)

B. *Hazelwood* Does Not Require Viewpoint Neutrality.

While not necessary to resolve this case, the notion that *Hazelwood* permits educators to make viewpoint-based decisions in determining what speech will bear the school's imprimatur is directly addressed in *Hazelwood*: "A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order. . . ." 484 U.S. at 272. Thus, *Hazelwood* expressly contemplates that a school can support speech that advocates sobriety but not drunkenness, sexual responsibility but not sexual profligacy, racial tolerance but not racial hatred, gender equity but not gender dominance, and self-government but not totalitarianism.

The rationale underlying *Hazelwood* is that "public schools are . . . vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system." *Board of Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quotation marks omitted). As *Hazelwood* explains, if Petitioners' position

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subject matter so long as the distinctions are reasonable in light of the purposes served by the forum," *Cornelius*, 473 U.S. at 806. This Court has long recognized that avoiding controversy and disruption is a permissible reason for restricting subject matter in limited or nonpublic forums. *Id.* at 811; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (upholding prohibition against political advertising on city buses). This principle finds special application in the context of religion and public schools. *See Santa Fe*, 530 U.S. at 311 (school program encouraging divisiveness along religious lines is at odds with Establishment Clause).

were adopted then "schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272 (citation and quotation omitted).

This Court should be under no illusion as to the consequences of the rule that Petitioners seek to impose. If viewpoint neutrality is required, students will be empowered to fill school newspapers, yearbooks, art displays, and, in this case, the walls of the school with work that is morbid (the tile of a face with blood dripping from the temple), antisocial (the tiles with gang graffiti), or lawless (the tile with the anarchy symbol). A school paper that runs an article encouraging young women to pursue a career in law would be compelled to run an article contending that women are emotionally unsuited for the profession. A school that allows students to design a bulletin board promoting racial tolerance would be compelled to allow other students to promote racial supremacy.

The consequences of incorporating a viewpoint neutrality requirement into school-sponsored speech go well beyond compromising the educational mission of schools. Doing so would further blur the inevitably indistinct line between content and viewpoint-based decisions. *Rosenberger*, 515 U.S. at 830-31 (distinction between content and viewpoint "is not a precise one."). For example, while *Searcey* ostensibly condemns viewpoint-based regulations,

in attempting to apply this rule the court ends up condoning what the rule condemns.[20] 888 F.2d at 1322 (regulation prohibiting a group whose sole purpose is discouraging students from pursuing a particular occupation or educational opportunity is permissible); *id.* at 1324 (regulation banning criticism is permissible to the extent that it prohibits a group from denigrating the opportunities offered by another group); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998) (urging caution in extending principle of viewpoint neutrality to public broadcasters, explaining, "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others.").

In addition, if schools are faced with an "all-viewpoints or no-viewpoints" choice, schools likely will not sponsor any expressive activities. "A First Amendment jurisprudence yielding these results does not promote speech but represses it." *Id.* at 682.

Petitioners close with a cry of wolf:

> The Tenth Circuit thus misses the point in observing that viewpoint neutrality would require

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[20] This case hardly presents a suitable vehicle for cleanly dissecting the concept of viewpoint from subject matter because a wide variety of tiles were removed and Petitioners' tiles were not displayed for *two* reasons; (1) the concern related to unrestrained religious debate, and (2) because they served as memorials to the attack (*e.g.*, "4/20/99 Jesus Wept," "There is no peace, says the Lord, for the wicked."). *Fleming*, 298 F.3d at 933.

> Respondent to post a tile that states "God is Hate" if it posts one stating "God is Love." Rather, in its regime allowing Respondents to employ viewpoint discrimination, Respondents could choose to display a tile that states "God is Hate" (or "God is Love," or "God is a Myth") with no obligation to post tiles that express other viewpoints.

Pet. at 27.

This protest ignores that *Hazelwood* has limits. While there is a legitimate pedagogical reason for promoting sobriety over drunkenness, there is no legitimate pedagogical reason for promoting God is Hate over God is Love. Indeed, if the school were to protect one statement to the exclusion of the other, it would violate the Establishment Clause. *Santa Fe*, 530 U.S. at 309 (school sponsorship of a religious message is impermissible); *Stone v. Graham*, 449 U.S. 39 (1980) (permanent display of Ten Commandments in public school violates Establishment Clause).

In the end, this protest gives up the game. Petitioners note that the school did not post God is Hate or God is a Myth to the exclusion of God is Love. In so doing, they concede that school officials acted in a viewpoint neutral fashion to avoid the debate entirely. While *Hazelwood* authorizes viewpoint-based decisions,[21] it authorizes something else as well: "A school must also retain the authority to refuse to . . . associate the school with any

[21] 484 U.S. at 272 ("A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order. . . .").

position other than neutrality on matters of political controversy." 484 U.S. at 272. This is exactly what Columbine school officials did: "[T]he District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 933-34.

CONCLUSION

On April 20, 1999, two young men trapped nearly two thousand students in Columbine High School for several hours to the sound of gunfire, explosions, fire alarms, and sirens. Those students emerged to the knowledge that twelve classmates and a teacher had been murdered and dozens of other classmates had been maimed within the building that they called "school." Reopening that building forced educators, who were themselves struggling with the loss of their students and colleague, to make difficult decisions as to how to appropriately honor those who were lost while accommodating the needs of those who remained. Difficult decisions cannot, and do not, satisfy everyone. Petitioners – families of students who were lost – may wish that different decisions had been made. Nonetheless, the Tenth Circuit properly recognized that the decisions that were made were reasonable and legitimate. Petitioners offer no basis for prolonging this litigation by revisiting those decisions in the name of the Constitution.

WHEREFORE, the Respondent respectfully asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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